Supreme Court, U. S.
FILED
AUG 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-115

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION

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Respondents.

BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION

Respondent ITT World Communications Inc. ("ITT Worldcom") submits this brief in opposition to the petition for a writ of *certiorari* filed by the Western Union Telegraph Company (the "Telegraph Company" or "WU").

QUESTION PRESENTED

Whether the Court of Appeals erred when it held that Section 222 of the Communications Act, which permitted the Telegraph Company to acquire its only domestic competitor despite the prohibitions of the antitrust laws, bars the Telegraph Company from engaging in international telegraph operations as "the price paid by the company for the acquisition of a domestic monopoly over telegraph service." (App. A-14)[1]

1. References in the form "App." followed by a capital letter and number are to pages of the appropriate Appendix to the Telegraph Company's Petition. The quotation is from the Court of Appeals' decision, *Western Union International, Inc.* v. *F.C.C.*, 544 F.2d 87, 93 (2nd Cir. 1976).

STATEMENT

The statute at issue in this proceeding, Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. § 222, is a special exemption from the antitrust laws which was enacted for the Telegraph Company's benefit in 1943. (App. A-8) An understanding of its purpose requires a brief discussion of its background.

A. Background.

As the Court of Appeals recognized, Section 222 had its origin in the economic difficulties facing the American telegraph industry during the depression of the 1930's. (App. A-7) One of the two large domestic carriers, Postal Telegraph Company ("Postal"), was "on the verge of financial collapse," (App. A-7), and the Telegraph Company was also experiencing economic difficulties. (App. D-18) A congressional study concluded that the financial health of the telegraph industry would be improved if Postal were merged with the Telegraph Company. (App. A-8, D-18) However, such a merger would have been of dubious legality under the antitrust laws, since it would give the Telegraph Company a "virtual monopoly" over domestic telegraph service. (App. D-18, D-19) Congress therefore enacted Section 222 to exempt the proposed merger, upon approval by the Federal Communications Commission ("FCC"), from the operation of the antitrust laws.[2]

At the time Congress enacted Section 222, the Telegraph Company was providing both domestic and international telegraph services. (App. A-8, D-19) The proposed

2. Section 222(b)(1) provides:
"It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger . . . ."

merger therefore posed a severe competitive threat to the independent international telegraph companies ("IRCs").[3] (App. A-8, D-28) These carriers transmitted telegraph messages between the United States and various overseas locations, but they did not maintain extensive telegraph networks within the United States. (App. D-28) They were thus dependent on Postal and the Telegraph Company to originate and deliver international telegrams in the "hinterland" beyond the small number of "gateway" cities in which they operated domestically. (App. D-28) The absorption of Postal by the Telegraph Company would therefore leave the IRCs totally dependent on the Telegraph Company, one of their competitors in the international area, for domestic services which were essential to their continued operation and success. (App. A-8, D-28)

To protect the IRCs from the anticompetitive effects of the proposed merger, Congress provided, in Section 222(c)(2), that if the Telegraph Company chose to acquire Postal, it would be required to divest itself of its international telegraph operations:

> "Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger . . . ."

It is the effect of Congress' divestiture clause which is at issue here.

Subsequent to the enactment of Section 222, the Telegraph Company consummated its merger with Postal. Divestiture of the Telegraph Company's international operations was accomplished in 1963, when the Telegraph Company transferred those operations to an independent,

3. The international carriers are, in the parlance of the trade, referred to as "international record carriers" or "IRCs".

newly-formed company, respondent Western Union International, Inc. ("WUI").[4] This divestiture completed the structure of the telegraph industry which Congress envisioned when it enacted Section 222. The Telegraph Company, the only domestic telegraph carrier, was confined to domestic activities, and the international market was served by a number of competing IRCs, including ITT Worldcom and WUI.[5] (App. A-4)

B. Proceedings Before the FCC.

The instant controversy commenced on April 4, 1972, when the Telegraph Company filed an application, pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, for authority to offer an international telegraph service known as "Mailgram"[6] between the United States mainland and Hawaii:[7] (App. D-2, n.1)

The FCC's Common Carrier Bureau rejected the Telegraph Company's application on the grounds that Section 222 prohibited the Telegraph Company from resuming international operations. However, the full Commission reversed that decision, and directed the Common Carrier Bureau to accept the Telegraph Company's application for filing, to be considered along with the competing applica-

4. (App. D-18) The events leading up to the divestiture, which the Telegraph Co. delayed for twenty years after its merger with Postal, are described in *Western Union Telegraph Co.* v. *United States*, 267 F.2d 715 (2nd Cir. 1959).

5. The other major IRCs are RCA Global Communications, Inc. and TRT Telecommunications Corp. There are also several smaller international carriers competing in the market.

6. The principal difference between Mailgram and traditional telegraph services is that Mailgrams are delivered to the recipient by the postman rather than a Telegraph Company messenger. (App. A-3-A-4)

7. Although Hawaii is, of course, a state, telegraph service between Hawaii and the mainland is categorized by Section 222(a)(10) as international telegraph service. (App. A-5)

tions for authority to provide Mailgram-type services to Hawaii which had been filed by the IRCs and other carriers.[8]

In its decision, the FCC recognized that if the Telegraph Company's application were granted, the Telegraph Company would be permitted to engage in international telegraph service for the first time since the divestiture of its international operations in 1963. (App. D-7-D-8) The Commission also recognized that the divesture clause of Section 222 must be read as a continuing bar to the Telegraph Company's resumption of its divested international operations:

> "We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS[9] operations in competition with the IRCs." (App. D-28)

Nevertheless, in what the Court of Appeals subsequently characterized as an "unjustified" and "strained" reading of the statute, (App. A-13), the Commission found that Section 222(c)(2)—by describing the international telegraph operations to be divested as those operations "theretofore" carried on by either Postal or the Telegraph Company—distinguished sharply between "old" telegraph services which were in existence when Section 222 was enacted in 1943, and "new" telegraph services, such as Mailgram, which had been developed in the intervening years. Although the Telegraph Company was barred by Section 222(c)(2) from

8. The FCC's decision is reproduced as Appendix D to the Petition.

9. The FCC's abbreviation stands for "public message service," the industry's term for traditional telegraph service.

offering "old" services internationally, the Commission held that it had jurisdiction to consider the Telegraph Company's application to provide "new" services. (App. D-11) In drawing this distinction, the FCC made no effort to explain what rational purpose Congress might have had for distinguishing between "old" and "new" international services, when the Telegraph Company would have the same opportunity to exploit its domestic monopoly and compete unfairly with the IRCs regardless of whether the international telegraph service in question were "old" or "new". Nor did the Commission attempt to explain why Congress included a definition of "international telegraph operations" in Section 222 which was broad enough to encompass both "old" and "new" services, if Congress had indeed intended to limit the scope of Section 222 to services in existence in 1943.[10]

C. The Court of Appeals Decision.

On appeal, the Court of Appeals for the Second Circuit reversed the FCC and held that Section 222(c)(2) bars the Telegraph Company from engaging in international telegraph operations unless and until Congress determines that the divestiture clause should be modified.

In reaching its decision, the Court of Appeals first considered the FCC's argument that Section 222(c)(2), like the rest of the Communications Act, should be construed as "setting down only 'broad legislative goals' and allowing the FCC broad and flexible power to achieve those goals 'in the light of changing circumstances'." (App. A-6) While the court did not deny that, as a general rule, the Communications Act left the FCC a great deal of flexibility and discretion to regulate matters within its jurisdiction, it refused to

10. Section 222(a)(6) provides:
"The term 'international telegraph operations' includes acceptance, transmission, reception and delivery of record communications by wire or radio. . . ."

hold that the detailed Congressional plan for the merger of Postal and the Telegraph Company was intended as nothing more than a non-binding statement of legislative goals which left the FCC free to follow any course it chose. (App. A-9) The court pointed out that the Congressional study which preceded Congress' consideration of Section 222 had recommended that the FCC should be permitted to decide whether the international operations of the Telegraph Company should be restricted after the merger, if the Commission found such a restriction to be in the public interest. (App. A-7-A-9) However, that recommendation was ultimately rejected by Congress, and Section 222 expressly required the FCC to bring about divestiture of the merged company's international operations, leaving the FCC only the discretion to fix a reasonable time in which divestiture would be accomplished. (App. A-9) The court concluded, in view of this legislative history, that Congress had chosen to decide the future of the Telegraph Company's international operations itself, rather than delegating that decision to the FCC:

> "In short, the evolving language of the statute itself militates against a reading of § 222(c)(2), as the FCC read it, to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC 'broad and flexible powers to achieve those goals in the light of changing circumstances.' Instead, in enacting this governing statute, Congress granted the FCC only the power to fix, in its discretion, the time within which the divestiture of international operations by domestic merged entities was to be accomplished. Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power." 544 F.2d at 90-91. (App. A-9)

Having rejected the FCC's argument that Section 222 did no more than establish "broad legislative goals," the Court of Appeals turned to the more narrow ground on which the FCC rested its original decision; namely, that Section 222 was applicable only to "old" telegraph service and did not prevent the FCC from authorizing the Telegraph Company to offer "new" services not in existence when Section 222 was enacted in 1943. (App. A-11) The court concluded "that there is no basis whatever in the legislative history to support so limited and strained a construction of the statute." (App. A-11)

The Court of Appeals reviewed a number of statements from the legislative history of Section 222 which indicated that Congress' concern was not limited to the particular types of telecommunication services which existed in 1943, but rather that Congress intended to address the more basic question of how the telegraph industry should be structured to minimize the adverse effects which could result from the Telegraph Company's monopolization of domestic telegraph service. (App. A-11-A-12) In this context, the Court of Appeals held that it must reject the FCC's argument (which had no support in the legislative history) that the phrase "theretofore carried on" was intended by Congress to remove "new" telegraph services from the scope of Section 222. (App. A-13) As the court pointed out, the FCC's construction of Section 222 would seriously undermine the protection which Congress had intended to provide the IRCs from abuses of the Telegraph Company's monopoly, since the Telegraph Company would, under the FCC's theory, be free to re-enter international competition by the simple expedient of introducing "new" telegraph services slightly different from the types of service available in 1943:

> "The FCC's heavy reliance on the 'theretofore' language of § 222(c)(2), *supra*, is, therefore, unjustified.

> The word 'theretofore' must be placed in its proper context by looking at the legislative history as a whole, *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972), which does not reveal an intent by Congress to use the word as a line of demarcation for the types of international record services which WU could or could not engage in after the merger with Postal Telegraph. To hold otherwise would not only give the word 'theretofore' a strained meaning, but would imply that WU could defeat the import of the congressional scheme of § 222 by re-entering international operations shortly after its mandated divestiture by developing or acquiring interests in modes of record communications, other than standard telegraph service, not engaged in by the company in 1943." 544 F.2d at 92. (App. A-13)

Having concluded that Section 222 denied the FCC authority to consider the Telegraph Company's application to provide what was concededly an international telegraph service, the Court of Appeals reversed the FCC. Judge Mansfield dissented.[11]

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11. Judge Mansfield's dissent was based primarily on his conception of the so-called "plain meaning" rule of statutory construction, which is out-of-step with the views expressed by this Court, *see, e.g. Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962) and his colleagues on the Second Circuit, *see, United States* v. *Reid*, 517 F.2d 953, 967 (2nd Cir. 1975). Judge Mansfield concluded that Section 222 did not prevent the Telegraph Company from resuming its international operations after divestiture had been completed. However, it is unreasonable to assume that Congress would expressly require the Telegraph Company to divest itself of its international operations, but leave the Telegraph Company free to undo the effects of that divestiture by resuming those same international operations the moment after divestiture was completed. As the FCC itself recognized (in the passage quoted, *supra*, p. 5), Judge Mansfield's construction of the divestiture clause renders the statute "meaningless and absurd", and his reading of Section 222 was properly rejected by the majority of the Second Circuit panel. See p. 16, *infra*.

ARGUMENT

The Court of Appeals' decision does not present an important question of federal law, nor is it in conflict with any of this Court's prior decisions, despite the Telegraph Company's suggestions to the contrary.[12] It is therefore inappropriate for this Court to grant a writ of *certiorari* to review the Court of Appeals' resolution of the issues presented to it.

A. The Petition Does Not Present An Important Question of Federal Law.

As demonstrated by its background and legislative history, Section 222 is a piece of special-interest legislation which was enacted solely for the benefit of the Telegraph Company, and the Telegraph Company, having voluntarily chosen to avail itself of the antitrust exemption offered by the Section, is the only company that is subject to the limitations on international activities which the Section imposes. This Court, in its discretion, should decline to adjudicate the meaning of a statute which is applicable to a single litigant.

The limited scope of Section 222 is illustrated by the fact that the Telegraph Company's Petition marks the first time in the 30-odd year history of Section 222 that this Court has been asked to consider the Section's meaning or significance. Although Section 222 is literally applicable to any merger of "domestic telegraph carriers," the Telegraph Company is, as a practical matter, the only company remaining in that category, and the Court of Appeals' interpretation of Section 222 is therefore unlikely to have any effect on any

12. The Telegraph Company's Petition does not argue that the Second Circuit's decision is in conflict with the holdings of any other circuit. The Second Circuit is, apparently, the only Court of Appeals which has ever considered the meaning of Section 222.

other party in any future litigation. Nor will the resolution of any other case pending in the lower courts be determined or guided in any way by the Court's decision of the instant controversy.[13] Under these circumstances, the Telegraph Company's Petition does not present a question of general public importance which this Court should resolve.

Apparently aware that its own dissatisfaction with the limitations placed upon it by Section 222 is not an adequate ground for invoking this Court's jurisdiction, the Telegraph Company argues that its disqualification as an applicant to provide international telegraph service will somehow impinge on the FCC's ability to perform its statutory functions. However, since the FCC has not seen fit to file its own petition for a writ of *certiorari*,[14] it is at least open to question whether the FCC itself feels that the Court of Appeals' decision represents a significant obstacle to achieving any of its regulatory objectives.[15] Even though the

13. *Compare, United States* v. *Constantine*, 296 U.S. 287. 290 (1935).

14. The FCC has, however, indicated it might support the Telegraph Company's application for a writ.

15. The Telegraph Company's Petition suggests that, as a result of the Court of Appeals' decision, the FCC will be required to reexamine a number of grants of authority to the IRCs. This, however, is not the case. Since Section 222(c)(2) is applicable only to the Telegraph Company, the Court of Appeals' opinion will not, as a matter of law, affect the validity of any certificate of authority awarded to any other carrier.

It should be noted that the FCC decisions which purportedly comprise a policy of permitting the IRCs or their affiliates to compete with the Telegraph Company domestically, *see, RCA Global Communications, Inc.*, 42 F.C.C. 2d 774 (1973); *American Satellite Corp.*, 43 F.C.C. 2d 348 (1973); *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859 (1974), (cited in the Petition at p.11, n.9) only authorized the IRCs or their affiliates to participate in communication satellite ventures or specialized common carrier networks. These decisions do not permit the IRCs to compete with the Telegraph Company to provide domestic telegraph services such as PMS or Mailgram, and the FCC has been careful (in these and other cases) to place restrictions on the IRCs' operating authority which protect the Telegraph Company's domestic position.

Telegraph Company is foreclosed from consideration as a potential carrier of international telegraph services, the FCC will still have the option of authorizing any or all of the IRCs to provide such services. Thus, in the international area, the FCC has the opportunity to choose among a number of potential carriers, a luxury of choice it has not enjoyed with respect to domestic services because the Telegraph Company has no significant domestic competitors.[16] Moreover, should the IRCs ever fail to provide adequate international service at reasonable rates, the FCC has more than adequate powers under the Communications Act to require them to do so.[17] It is therefore difficult to perceive how the FCC will be inhibited in performing its regulatory duties by the Court of Appeals' decision, and the Telegraph Company's Petition fails to explain why the decision will have such an unlikely result.

In refusing to disturb the Court of Appeals' decision, the Court would merely preserve the *status quo* which has existed in the telegraph industry since the Telegraph Company divested itself of its international operations fourteen years ago. Significantly, the FCC did not find in its decision, nor argue before the Court of Appeals, that the international telegraph service provided by the IRCs has been inadequate in any respect during those fourteen years, despite the Telegraph Company's absence from the inter-

16. As noted above, three IRCs and the Hawaiian Telephone Company are seeking Commission authorization to offer Mailgram-type service to Hawaii, the particular type of telegraph service at issue here. (App. D-10-D-11)

17. See, generally, Sections 201-205 and Section 214 of the Communications Act, 47 U.S.C. §§ 201-205, 214. In order to assure that common carriers subject to its regulation are providing adequate service, the FCC has statutory authority to, *inter alia,* prescribe reasonable rates for carriers' services (Section 205), prohibit carriers from discriminating between different persons or different localities in their rates or practices (Section 202), and compel carriers to acquire adequate facilities for the performance of their common carrier services. (Section 214(d)).

national market. Should it ever appear that it might be in the public interest for the Telegraph Company to resume international operations, the Court of Appeals has not raised an insurmountable obstacle to the Telegraph Company's re-entry into the international market, but has merely held that Congress has reserved the decision on that question to itself, rather than delegating it to the FCC.[18]

In short, the instant controversy is nothing more than a dispute among a number of regulated common carriers as to how many of them are eligible under the Communications Act to serve a particular geographical area. The Court of Appeals' delineation of the boundaries which Congress placed on the Telegraph Company's operations is of obvious interest to the carriers involved. However, the telegram-sending public will not be affected by the Court of Appeals' decision, since adequate service will be provided in all events. The Petition therefore does not present a significant issue of public importance which this Court should resolve.

B. The Court of Appeals Decided This Case Correctly and in Full Accord With This Court's Decisions.

The Telegraph Company argues that the Court of Appeals' decision was contrary to this Court's holdings in *United States* v. *Southwestern Cable Company,* 392 U.S. 157 (1968) and *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972). However, Section 222 was not at issue in

18. Indeed, bills to modify or reverse the Court of Appeals decision have already been introduced in Congress by the Telegraph Company's supporters. On August 5, 1977, the Senate approved a bill, S. 1866 (95th Cong., 1st Session), which would permit the Telegraph Company to apply for authority to provide Mailgram and other telegraph services between the Continental United States and Hawaii. The bill would accomplish this result by amending Section 222 to redefine Hawaii as a domestic, rather than an international, point.

either of those cases and, moreover, their reasoning has no application to the facts of the instant case.

In *Southwestern Cable* and *Midwest Video,* the Court considered the FCC's jurisdiction to regulate community antenna television ("CATV"), a form of communications which was not in existence when the Communications Act was enacted in 1934. The Court, however, found that CATV came within the FCC's statutory grant of jurisdiction to regulate "all interstate . . . communication by wire or radio,"[19] and that the Commission's efforts to regulate CATV were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[20] The Court therefore recognized the FCC's authority to regulate CATV broadcasting despite the fact that the Communications Act did not explicitly address the FCC's jurisdiction over CATV.

Unlike *Southwestern Cable* and *Midwest Video,* the present case does not involve the scope of the FCC's general grant of jurisdiction to regulate the telecommunications industry. In contrast to its silence with regard to CATV, Congress has enacted, in Section 222, a comprehensive statutory plan for the merger of Postal and the Telegraph Company. In that Section, Congress chose to decide a number of details concerning the merger which it might otherwise have delegated to the FCC.[21] It is therefore

19. Communications Act, Section 2(a), 47 U.S.C. § 152(a).

20. *Southwestern Cable Co., supra,* 392 U.S. at 178. *Accord, Midwest Video Corp., supra,* 406 U.S. at 664-670.

21. For example, Congress itself provided that the Telegraph Company should divest itself of its international operations, despite suggestions that this question could be left to the FCC. See p. 7, *supra.* Section 222 also provided that the FCC should not approve any plan of merger which resulted in a significant alien ownership of the merged company's stock (Section 222(d)). The FCC was directed to develop a formula for the distribution of outgoing international telegraph traffic which would treat the merged carrier's international division and the IRCs equally (Section 222(e)). Congress also took it upon itself to prevent the merged carrier from discharging any employees with more than 4 years of seniority, and to provide other measures to protect the Telegraph Company's employees from the dislocations resulting from the merger. (Section 222(f)). Obviously, Congress could have left all these details to the FCC, but chose not to do so.

[Footnote continued on next page]

indisputable that Congress has limited the FCC's general jurisdiction to deal with the consequences of the merger between Postal and Telegraph Company, and the only issue presented here is whether one of the matters Congress decided in Section 222 was that the Telegraph Company should be barred from international operations unless Congress acted to relieve it of that bar. *Southwestern Cable* and *Midwest Video* are neither controlling nor illuminating on this narrow question, for neither of these decisions suggests that the FCC's broad general grant of regulatory jurisdiction permits the Commission to ignore a clear statutory limitation on its authority.[22]

The issue presented to the Court of Appeals was thus nothing more than a straightforward question of statutory construction, which it resolved correctly and in accordance with this Court's prior decisions.[23]

[Footnote continued from previous page]

22. *National Ass'n. of Regulatory Utility Commissioners* v. *F.C.C.,* 533 F.2d 601, 617 (D.C. Cir. 1976); *American Telephone & Telegraph Company* v. *F.C.C.,* 487 F.2d 865, 875 (2nd Cir. 1973). *See also, GTE Service Corp.* v. *F.C.C.,* 474 F.2d 724, 733 (2nd Cir. 1973).

23. As the FCC itself stated, the question presented in the instant case is quite limited, and has nothing to do with the scope of the FCC's general grant of statutory authority to regulate the communications industry:

> "[W]e are faced with the narrow legal question whether the [Common Carrier] Bureau correctly interpreted the divestment clause of Section 222(c)(2) as a permanent bar to WU international or overseas telegraph operations." (App. D-6)

In finding that the divestiture clause of Section 222 constituted a continuing barrier to the Telegraph Company's resumption of international telegraph operations, the Court of Appeals properly gave that clause the well understood meaning which is familiar to the antitrust bar.[24] As the FCC had itself recognized, Section 222(c)(2) would be rendered "meaningless and absurd" if it were not interpreted as preventing the Telegraph Company from resuming the international operations it was required to divest. (App. D-28, quoted *supra,* p. 5) Any other decision on this point would not only permit the Telegraph Company to evade the purpose of Section 222, but might also, by analogy, undercut the effectiveness of innumerable divestiture judgments by leaving defendants unrestrained from reacquiring the very assets they were ordered to divest.[25]

The only remaining question before the Court of Appeals was whether Congress, by describing the operations to be divested as those "theretofore carried on" by the merged carrier, intended to exclude "new" telegraph services developed subsequent to 1943 from the ban on the Telegraph Company's international activities. The Court of Appeals resolved this issue in the manner prescribed by this Court. First, the Court of Appeals looked to the "plain meaning" of the statute[26] and found that the interpretation which the FCC urged for the "theretofore" phrase gave the statute a "strained" meaning.[27] (App. A-13) Secondly, the court

24. *See, United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 240 (1975).

25. *See, United States* v. *Paramount Pictures, Inc.,* 165 F.Supp. 643, 645 (S.D.N.Y. 1958), *appeal dismissed,* 358 U.S. 28 (1958).

26. *See, e.g., United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543-44 (1940).

27. *See, Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U.S. 418, 427 (1972). The FCC's interpretation of the "theretofore" phrase of Section 222(c)(2) is not only "strained", but also ungrammatical. If Congress had really meant to refer only to the telegraph services in existence when the statute was enacted in 1943, it would

[Footnote continued on next page]

looked to the legislative history, and found no support for the FCC's interpretation.[28] (App. A-11-A-12) Thirdly, the court examined the purpose which the divestiture clause was intended to accomplish, and concluded that purpose could be defeated by the construction of Section 222 which the FCC was supporting.[29] (App. A-13) Finally, the Court of Appeals noted that the interpretation of Section 222 which the FCC was now urging was inconsistent with both the FCC's and the Telegraph Company's own previous understandings of the statute.[30] (App. A-10) The Court of Appeals' careful statutory analysis meets every standard suggested by this Court and, moreover, clearly reached the the correct result.

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presumably have described them as those operations *"heretofore"* carried on. If the word "theretofore" is given its plain meaning, the requirement that the merged carrier divest itself of international operations "theretofore" carried on must be read as indicating that all operations carried on *at the time of divestiture* must be given up. When Section 222 was enacted, Congress recognized that divestiture of the Telegraph Company's international operations would be delayed by World War II and various other considerations (and, indeed, divestiture was not accomplished until twenty years after the Section was enacted). The insertion of the word "theretofore" in Section 222(c)(2) must have been intended to make absolutely clear Congress' mandate that on the uncertain future date when divestiture finally occurred, *all* of the Telegraph Company's international operations then being "carried on" would be divested, and not just those operations which had been in existence when the statute was enacted or which were carried on when the merger occurred. Thus, far from being a limitation on the divestiture clause, Congress' use of the word "theretofore" underscores the all-inclusive scope of the prohibition on the Telegraph Company's international activities.

28. *See, Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9-10 (1976); *Cass* v. *United States,* 417 U.S. 72, 77-79 (1974); *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972).

29. *See, United States* v. *Bornstein,* 423 U.S. 303, 310 (1976); *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974); *National Woodwork Manufacturers Ass'n.* v. *N.L.R.B.,* 386 U.S. 612, 619 (1967); *United States* v. *American Trucking Ass'ns., Inc., supra,* 310 U.S. at 543.

30. *See, United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858 n. 25 (1975); *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 426.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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August, 1977